Supreme Court, U.S.
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Docket No. ____

IN THE SUPREME COURT OF THE UNITED STATES

RODGER L. MCAFEE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Appeal from the United States Court of Appeals
For the 9th Circuit

PETITION FOR WRIT OF CERTIORARI

Rodger L. McAfee, In Propria Persona
P.O. Box 175
El Nido, California 95317
Tel: (559) 486-5795

24 pp

QUESTIONS PRESENTED FOR REVIEW

1. Can the government be equitably estopped from foreclosing if the Court finds that the government engaged in affirmative misconduct?

2. Did the Court of Appeals commit reversible error by affirming the district court's grant of summary judgment when the government intervened in an action and took a monetary setoff from Petitioner's loan account rather than foreclosing on the deed of trust securing the loan in violation of California's One Action Rule?

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the 9th Circuit, reported at 44 Fed. Appx. 223 are reprinted as Appendix A. It affirms judgment of the United States District Court for the Eastern District of California based on a memorandum and order case no. CV F 96-5720 AWI SMS which is reprinted as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the 9th Circuit was entered on August 13, 2002. On September 30, 2002, Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc. The court below entered an order denying the petition on November 14, 2002. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon section 1254(1) of the Judicial Code (28 U.S.C. §1254(1)).

STATUTES INVOLVED

The relevant statutory provisions are the California "One Action Rule" (California Code of Civil Procedure §726, (2002)); Doctrine of Equitable Estoppel; Federal Tort Claims Act (28 U.S.C. §2680(a)(2002)); Federal Rules of Civil Procedure 56(c);

STATEMENT OF THE CASE

In June 1996, the United States brought a suit to foreclose on the following collateral securing the promissory notes that the Petitioner had delivered to FmHA for emergency farm loans totaling $2,075,980: (1) deeds of trust encumbering 1,477 acres in El Nido, California (2) deeds of trust encumbering 405 acres in Kerman, California and (3) security agreements encumbering farm-related equipment.

The United States moved for summary judgment, and Petitioner opposed the motion. The district court referred the case to a magistrate judge for findings and recommendations. As relevant here Petitioner argued that (1) FmHA is equitably estopped from foreclosing on his property; (2) his debt is offset by the losses he incurred due to FmHA's "affirmative misconduct" in administering the loan and supervising the well construction; and (3) California's "One Action Rule" precludes FmHA from foreclosing on his property. The magistrate judge rejected these arguments and recommended that judgment be entered in favor of the United States.

Petitioner challenged the magistrate judges' findings and recommendations. The district court, based on its plenary review of the record and its de novo consideration of the issues, granted summary judgment to the United States.

The Petitioner appealed the district court's decision to the 9th Circuit who subsequently affirmed the district court's ruling.

SUMMARY OF FACTS

Rodger L. McAfee ("Petitioner) and his former wife, Darlene McAfee ("Darlene") purchased 1477 acres of farmland in El Nido, California in 1976 ("El Nido" property). In the following months, the area suffered severe drought and the strata shifted under

Petitioner's land. The six existing wells on the El Nido property failed and were no longer supporting the farm's irrigational needs. To continue farming operations, Petitioner decided to recondition the six existing wells and drill additional wells on the land.

As a result of California's draught, many farmers could not irrigate their land and were therefore unable not produce crops sufficient to sustain farming operations. In response to the draught and pursuant to the 7 U.S.C.S. 1961, Congress allocated funds to assist farmers with well drilling and well reconditioning projects through the Farmers Home Administration (FmHA).

In late 1977, Petitioner and Darlene applied for a FmHA loan under the Act to avoid losing the farm. The application was submitted to the local FmHA office in Merced County for review and was thereafter rejected. Petitioner administratively protested the denial of emergency FmHA funds by appealing to the FmHA's state office.

Upon review of Petitioner's appeal, the state director for FmHA (Mr. Lowell A. Panell) concluded that the denial of emergency funds was politically motivated and thereafter overturned Petitioner's initial denial of emergency funds. (It is important to note that during the 1960's and 70's, Petitioner was a committed political activist. Petitioner was highly active in many social movements, primarily those aimed at giving farm workers the opportunity to prosper from the fruits of their labor. For example, Petitioner was a strong supporter of the United Farm Workers movement and held close ties with Cesar Chavez. However, because Petitioner actively supported the farm worker's movement, the local FmHA officials viewed Petitioner with disgust. The local FmHA official labeled Petitioner a "Communist" and accused him of being a member of the Communist Party.)

In 1978, the state FmHA official reviewed Petitioner's appli-

cation and subsequently approved Petitioner's application, reversing the local FmHA agent's decision. News of the reversal infuriated the local agent; increasing the animosity he felt toward Petitioner. This troubled Petitioner, particularly since the local FmHA agent was put in charge of disbursing the emergency funds. Petitioner was extremely concerned and fearful that FmHA would somehow sabotage the well drilling project. Accordingly, Petitioner contacted the state director to protest the local FmHA offices' authority in disbursing the funds. Despite Petitioner's opposition, the state director advised Petitioner that local FmHA agents were required to oversee disbursement of FmHA emergency funds.

Shortly thereafter, the local FmHA agent notified Petitioner that he must put up security before disbursement of the emergency funds. Petitioner and Darlene signed a security agreement and thereafter executed a deed of trust for the El Nido property. However, FmHA advised Petitioner that the government required additional security and thereafter required Petitioner to encumber his family's 405acre ranch in Kerman, California ("Kerman Property") and other farm related equipment to secure the emergency funds. Petitioner and Darlene executed a deed of trust pertaining to the Kerman property.

Upon securing the emergency funds, FmHA's local agent began disbursing portions of the funds to pay-off Petitioner's existing debt at that time, which was completely unrelated to the drilling project. Petitioner complained that the emergency funds were being ill spent and should be used exclusively for the well reconditioning and drilling project. FmHA warned Petitioner to stay out of the way and not to interfere with the project.

In April 1978, FmHA entered into a contract with the Water Development Corporation ("WDC") to perform the well drilling and well reconditioning project on the El Nido property. WDC immediately commenced work on reconditioning the existing wells,

however WDC failed to consult with FmHA's state engineer, Erwin Hofmann ("Mr. Hofmann") to obtain the necessary design plan to ensure a successful well drilling project. By the time Mr. Hofmann evaluated the well construction project in December 1978, the construction project was substantially underway. At that time, Mr. Hofmann made some recommendations to ensure successful farming operations upon completion of the project. The local FmHA agent disregarded Mr. Hofmann's recommendations and allowed WDC to continue drilling as previously planned.

By January 1979, it became clear that Petitioner would not have enough funds to complete the project and would require additional financing for the project to succeed. Petitioner became extremely distressed with the way FmHA had spent the emergency funds and became further distressed upon learning the project was going to fail without securing additional emergency funds.

In the spring of 1979, Petitioner was admitted into the Brite Institute after experiencing a complete mental and psychological breakdown. From this point forward, Petitioner no longer participated in the project and moreover, did not approve of FmHA's disbursement of the funds. As a result, Darlene was left alone to deal with Mr. Dent who thereafter pressured her to approve and sign off on the well drilling project. Petitioner did not have a qualified representative to approve the well drilling work.

By the time Petitioner was released from the Brite Institute, the loan proceeds had been exhausted and the project was completely abandoned. FmHA had spent over $2 million on the project yet disbursed less than ten percent (10%) of the proceeds on the actual drilling project. In the end, Petitioner was left with eight non-functioning wells and the complete failure of his farming operations.

In 1981, FmHA served the first of its Notices of Foreclosure on Petitioner. Petitioner retained counsel and later entered into a

stipulation with FmHA to suspend foreclosure proceedings until the completion of an investigation initiated by members of United States Congress through the Office of the Inspector General.

In 1983, Petitioner's children filed suit against Petitioner for wrongfully encumbering the Kerman property as security in obtaining the emergency funds. According to Petitioner's children, the property was to be held in trust and that Petitioner did not have the authority to use the property as security for the emergency funds.

The government intervened in the action (McAfee v. McAfee) instead of foreclosing on the deeds of trust Petitioner had pledged as security for the loans. The government settled with Petitioner's children then renegotiated its' security interest in the parcel to bolster its' own financial position. The government then took a monetary set-off against Petitioner's loan account without first foreclosing on the deeds of trust securing the loan in violation of California's "One-Action rule".

ARGUMENT

I. EQUITABLE ESTOPPEL

A. AFFIRMATIVE MISCONDUCT

The doctrine of equitable estoppel is warranted when a government employee conducts him/herself in a manner that intentionally or recklessly deprives an individual from a benefit that otherwise would have been available absent the official's affirmative misconduct. There have been a number of cases reviewed by this Court whereby a government official's conduct has been examined to determine when equitable estoppel is appropriate against the government due to the "affirmative misconduct" of its agent. And in each case, the Court has ruled that the government employee's conduct did not rise to the level whereby the doctrine should apply.

Understandably, this Court has a number of considerations to ponder in determining whether conduct by a government employee triggers equitable estoppel against the government. Protection of the public fisc and separation of powers are two such considerations. However, not least of the Court's considerations is the preservation of public confidence in its government officials. When an individual is treated the way Petitioner was treated, with the initial denial of emergency funds, then repeated threats of foreclosure and actual physical harm, a finding of affirmative misconduct must be made to prevent future harm and to restore the public's faith in our government officials. Recently, there has been growing public sentiment to bring a stop to "improper" conduct by government and corporate leaders. This citizens of this country want our governmental officials to be held accountable for their actions and this Court must do what is necessary to effect accountability in our government.

This Court has yet to find a case where a governmental official's conduct arose to a level that can be termed "affirmative misconduct". In every case, the official's misconduct did not trigger equitable estoppel and the government was not liable for the employee's actions.

In the present case, however, the actions taken by FmHA against Petitioner were so gross and malicious; the doctrine of equitable estoppel must apply against the government. As Petitioner will show, the level of affirmative misconduct he endured was significantly greater than those previously reviewed by the Court. Petitioner can be set apart from previous Supreme Court cases involving equitable estoppel against the government and shall distinguish his case from those previously reviewed by this Court.

In *Federal Crop Ins. Corp. v. Merrill*, (1947) 332 U.S. 380, two farmers had relied on a government agent's promise that their

entire wheat crop would be federally insured. Unbeknownst to the farmers and the agent, regulations had recently been changed by the FCIC whereby insurance for a portion of the crop was prohibited.

Later, when a draught had destroyed the wheat, the farmers sought to recover from their policy, but the FCIC refused to pay pursuant to the new regulations.

The Merrills brought suit against the government and argued that the government should be estopped from asserting the newly implemented regulations as a defense. The Court held that estoppel was unwarranted in the case. According to the Court, the farmers were presumed to know the content of FCIC regulations regardless of the "hardship resulting from innocent ignorance " id. at 385.

In *Montana v. Kennedy*, (1961) 366 U.S. 308, an alien sought to estop the government from asserting his lack of citizenship as grounds for deportation. The alien argued that he would have been born in America had his mother, a U.S. citizen, not been denied a passport to return to the United States by the immigration officer who mistakenly interpreted a federal statute as prohibiting her from entering the United States without a passport. The Court refused to apply estoppel to the government since the official's "well meant advice" fell "far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth" id. at 314-15.

In *I.N.S. v. Hibi*, (1973) 414 U.S. 5, the Court again reviewed a government's actions for purposes of determining whether equitable estoppel will lie against the government. In Hibi, a foreign national sought to estop the government from asserting a statutory deadline for applying for citizenship against him, arguing that the government neither informed him of his right to apply nor stationed nationalization officials in his country during the applicable statutory period.

The Court held that the government could not be estopped because failure to publicize rights or station officials in a foreign country did not amount to "affirmative misconduct." id. at 8-9. Moreover, the Court reasoned that Hibi's "effort to claim naturalization under a statute, which by its terms had expired more than 20 years before he filed his lawsuit, must fail" id. at 9.

The Court took another look at governmental affirmative misconduct when it reviewed *Schweiker v. Hansen*, (1981) 450 U.S. 785. In *Hansen*, the plaintiff tried to estop the government from enforcing a regulation that required potential beneficiaries under the Social Security Act to file written applications in order to qualify for certain insurance benefits. Although plaintiff would have been eligible to obtain these benefits had she filed the required application, the plaintiff failed to qualify because a government field agent, who mistakenly believed that the plaintiff was ineligible, instructed her not to apply.

The lower court ruled that the government should be estopped and that plaintiff should be compensated for the insurance benefits she otherwise would have been qualified to receive. Upon review by the Supreme Court, the Court refused to adopt the lower court's analysis which suggested that it was "more appropriate to estop the government when a procedural requirement had been asserted than when a substantive requirement was involved" *53 U. Chi. L. Rev. 1026* at 1032. The Court further reasoned that the conduct of petitioner's field representative, in erroneously informing respondent that she was not entitled to the benefits and in negligently disregarding petitioner's Claims Manual by failing to recommend that respondent file a written application, did not amount to affirmative misconduct. The government was again absolved of any liability due to the actions of its' agent. The Court, however, did provide some insight into how the elements of private estoppel might apply against the government by suggesting that reliance upon oral

representations of government officials might be per se unreasonable" *Hansen* at 788.

The following year, the Supreme Court expanded on Hansen upon review of *Miranda v. I.N.S*, (1982) 459 U.S. 14. In *Miranda*, petitioner attempted to estop the government based on its long delay in processing a permanent residency petition. The Ninth Circuit narrowly construed Hansen to apply only in cases involving the expenditure of public funds and held that estoppel was appropriate against the government. The Supreme Court reversed the Ninth Circuit's ruling by expressly rejecting the court's narrow reading of Hansen. The Court held that mere delay was not affirmative misconduct and that public funds were not the only area "of broad public concern that prevented estoppel against the government" id. at 19. The Court did not decide whether affirmative misconduct in a particular case would estop the government from enforcing the immigration laws, however it did hold that proof that petitioner failed to process promptly an application fell far short of establishing such conduct necessary to estop the government.

Two years later, the Court again examined the doctrine of equitable estoppel in *Heckler v. Community Health Services, Inc.*, (1984) 467 U.S. 51. In Heckler, a company called Community Health Services (CHS) participated in the Medicare and CETA programs. CHS was reimbursed for the costs of services provided to Medicare recipients, but was doubly reimbursed for some specific operating expenses because of overlap between the two programs. Government regulations prevented this double recovery unless the CETA funds were used as "seed money" for new health care agencies or for expanded services at existing agencies. CHS's fiscal intermediary, a private party acting on behalf of the government, orally informed CHS that these particular CETA funds fell within the seed money exception. CHS relied on this advice to expand its services and requested reimbursements from the government while continuing to receive CETA grants. When the Health and Human

Services Department later ruled that CETA grants were not seed money, CHS sought to block recovery of the funds by estopping the government from asserting its interpretation of the regulation in an action against CHS.

The Third Circuit agreed with CHS's argument and estopped the government. However, the Supreme Court unanimously reversed the Third Circuit, holding that CHS failed to establish the requisite elements of private estoppel. In addition, the Court ruled that CHS could not rely on the agent's erroneous statement regarding the regulations to trigger estoppel against the government. id. at 60-61. However, the Court refused to hold that the government could never be estopped, stating that there could be some case in which "the public interest would require it" id. at 60.

In examining the previous equitable estoppel cases reviewed by the Supreme Court, it is clear the Petitioner suffered a greater level of misconduct at the hands of a government employee. Petitioner was not simply given "bad advice" as in *Merrill* and *Montana*; or "erroneous information" as in *Hansen*; or the victim of "long delay" as in Miranda. Petitioner was the victim of a government official's malicious and gross desire to take revenge upon a "Communist", as viewed by the local FmHA official. FmHA knew or should have known that Petitioner was engaged in conduct protected by the First Amendment of the U.S. Constitution. Petitioner was exercising his constitutional rights and should not have been retaliated against for supporting the social movements at the time.

The government's agent did not like Petitioner actively supporting the social movements and sought revenge for Petitioner's protected conduct. The Court has not reviewed a case where equitable estoppel should apply more than in the present case. To begin, Petitioner's initial request for help were denied because of the government official's dislike of Petitioner. Secondly, the funds were negligently spent to purposely decrease the amount of funds

that would go to the well drilling and reconditioning project to make it unsuccessful. Third, FmHA threatened Petitioner with fore-warnings of physical harm and bodily injury if Petitioner continued protesting FmHA's disbursement of the emergency funds. Fourth, FmHA made the determination that the well depth would not exceed 420' even though FmHA knew that water would not be available at that depth. Fifth, FmHA caused Petitioner to suffer severe emotional and mental distress such that he required admittance into the Brite Institute for immediate treatment. Sixth, while Petitioner was seeking treatment, FmHA forced Petitioner's ex-wife to approve and sign off on the loan disbursements even though she had no knowledge or expertise in the endeavor. Seventh, while the local FmHA agent was engaged in obtaining approval from Petitioner's ex-wife, the government agent initiated extra-marital relations with Petitioner's then wife while Petitioner was away receiving treatment for the mental breakdown he had suffered.

The level of misconduct exercised by the local FmHA agent is so egregious; it completely overshadows the government's level of misconduct previous reviewed by this Court in equitable estoppel cases. The malicious actions that FmHA took to bring about the foreclosure proceedings against Petitioner must move this Court for a determination that equitable estoppel should apply against the government.

In examining the lower court's opinion on governmental affirmative misconduct, the Ninth Circuit ignored many essential facts that would have led to the appropriate application of equitable estoppel.

The Ninth Circuit held that Petitioner's reliance on FmHA letters to prove the project was going to fail "was mere speculation, not a reasonable inference drawn from evidence." (*United States of America v. Rodger L. McAfee*, Case no. 00-17334, 9th Cir. 2002) The letters were from FmHA's own expert, Irwin Hofmann, which foretold of the project's failure if the well depth stayed at 420' as

unilaterally decided by Mr. Dent. The lower court's reasoning completely ignored Hofmanm's skill, knowledge and expertise in well drilling projects. Moreover, the Ninth Circuit failed to consider any evidence Petitioner presented to the Court.

Petitioner provides the ideal occasion whereby equitable estoppel should apply against the government. The local FmHA agent's conduct in misspending the funds and the eventual demise of Petitioner's drilling project was done with the intent and purpose to doom Petitioner's farming operation. FmHA recklessly and intentionally misspent the emergency funds and left Petitioner in a worse predicament than before he sought emergency relief. Prior to receiving the funds, Petitioner had six non-functioning wells and a mortgage on the property. After receiving the funds, Petitioner was left with eight non-functioning wells, a mortgage on the property plus an additional $2 million debt that the government is seeking to recover.

B. SERIOUS INJUSTICE WITHOUT PUBLIC HARM

The Ninth Circuit reasoned that there was no clear evidence of "serious injustice" because Petitioner was in "disastrous financial circumstances... prior to the FmHA loan" and that Petitioner "used far more of his loan money to pay existing debts that he used to pursue his drilling project". (*U.S.A. v. McAfee*, Case no. 00-17334, 9th Cir. 2002) The Ninth Circuit also held that Petitioner was able to keep his property nearly 20 years longer that would otherwise been the case.

Petitioner may have used his loan money to pay existing debt, however, the Ninth Circuit and the district court missed the point of the loan and the well drilling project. The loan and project was established to help Petitioner recover from the disastrous drought of the 1970's. Petitioner needed the emergency funds to drill productive wells, irrigate the land, produce crops and eventual-

ly pay back FmHA's emergency funds. Through the local FmHA official's conduct, the government set up Petitioner for the eventual failure of his farm by digging non-producing wells and negligently spending the emergency funds. The government's own expert warned that there would not be any water found at the level the government wanted to dig the wells. Mr. Hofmann advised the local FmHA official that the wells would have to be between 800' to 1100' deep to achieve an adequate water supply sufficient to farm the 1477 acres.

The fact that the Petitioner has maintained possession of his property for over 20 years without foreclosure supports Petitioner's argument that the government has engaged in affirmative misconduct. The only party benefiting from this bureaucratic nightmare is the government. Interest on the loan has been accruing over the last twenty years whereby the government now contends Petitioner owes the government over $5 million. Therefore, despite the Ninth Circuit's contention, the government is the only party that has benefited from FmHA's affirmative misconduct.

The government is to blame for the unsuccessful drilling project. The government was determined to see Petitioner fail and intentionally misspent the funds so Petitioner could not successfully resume farming operations.

Furthermore, if the government were truly concerned about the public fisc, as alleged by the Ninth Circuit, the government would not have waited twenty years to foreclose on the property.

The government is attempting to foreclose on land in El Nido, Ca. and in Kerman, Ca. belonging to a farmer who initially looked to the government for help to save his farm. It is clear from the record that the local FmHA official did not want to help Petitioner save his farm. Petitioner testified that his initial request for emergency assistance was denied. Many farmers in the area

were provided relief from the government to help save their farms. In fact, the government granted millions of dollars to help farmers dig wells deep enough to produce irrigation water. However, when Petitioner requested such assistance, he was denied any help. Petitioner took it upon himself to go over the head of the local FmHA officials and requested help directly from FmHA's state director.

Through Petitioner's persistence, his request for emergency funding was granted. However, the funds were to be disbursed by the local FmHA office; the same office that continually denied Petitioner's requests for aid. This is akin to putting the fox in charge of the hen house. Mr. Dent's decision to deny Petitioner's emergency aid had been overturned by the state director. Mr. Dent resented Petitioner and vowed to do everything in his power to see Petitioner fail. Mr. Dent procured the well drillers for Petitioner's farm and had given strict orders not to dig deeper than 420'. Despite the expert opinions from Mr. Hofmann, Mr. Dent advised the well drillers to stop digging at a level that would produce no water. Mr. Dent was setting Petitioner up for the inevitable failure of the farm, the inability to re-pay the loans and the eventual foreclosure of the 1477 acres in El Nido, California.

There will be no harm to the public in allowing Petitioner to keep his land. In fact, Petitioner has dedicated the entire 1477 acres to Our Land Corporation, a non-profit land conservancy organization whose purpose is to help families support themselves through farming and agriculture related businesses. The entire 1477 acres in El Nido, Ca. will be divided among several families who will be taught the best methods for farming and will be provided the equipment and materials necessary to build and maintain successful farming operations.

Petitioner contends that the 1477 acres will best serve the public if they are committed to the land conservancy where families

can utilize the land, earn a living and stimulate the local economy. The public can benefit much more through the productive use of the land rather than allowing the land to be controlled by the ineffective and bureaucratic agency that has allowed this land to remain useless and idle for the past 20 years.

II. ONE ACTION RULE (C.C.P. § 726)

A. MULTIPLE ACTIONS

California Civil Procedure Code §22 defines an action as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (C.C.P. §726)

In 1983, the government intervened in an action between the Petitioner and Petitioner's children whereby Petitioner's children were suing to enforce their interest in the Kerman property. The land became encumbered when the government required additional collateral on top of the El Nido property. Petitioner used the Kerman property as secondary collateral in order to obtain the necessary emergency funds. The Kerman property was being held in trust whereby Petitioner's children were named as beneficiaries of the trust.

The government has stated that when it intervened in the action McAfee v. McAfee, the government was protecting its' interest in the encumbered property "to prevent the suit from extinguishing or diminishing its security interest in the Kerman property."

The government's intervention in the action to "protect its' interest" [emphasis added] qualifies as an action as defined by C.C.P. §22. Furthermore, C.C.P. §726 states that "There can be but one form of action for the recovery of any debt or the enforcement

of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter." In this case, the government has initiated multiple actions in its attempt to foreclose against the El Nido property, including the intervention in 1983. However, the government has carefully characterized the intervention as an attempt to "protect its interest" and not an "action" so as not to violate the one action rule.

Moreover, the government also violated the "security first" aspect of the One-Action Rule as articulated in *Security Pac. Nat'l Bank v. Wozab,* (Cal. 1990) 51 Ca. 3d 991. Upon intervening in the McAfee v. McAfee action, the government settled with the children by taking a quasi-personal judgment against Petitioner's children in the amount of $500,000 and thereafter took a setoff on Petitioner's loan account without foreclosing on the deeds of trust. When a secured creditor obtains judgment on the debt before foreclosing the security, he is deemed to have waived the security. This is the "sanction" aspect of section 726, *Walker v. Community Bank*, (Cal. 1974) 10 Cal. 3d 729. Under these authorities, the government must lose the security as a "sanction" because it took a monetary setoff before exhausting the security.

B. SET OFF

The Ninth Circuit Court held that the settlement between Petitioner's children and the government was not a "setoff" against Petitioner. The Court defined a setoff as being an "extrajudicial appropriation of the debtor's assets before foreclosure".

Extrajudicial is defined as "that which is done outside of a court's jurisdiction; not founded upon or dependent upon the authority of a court." In this case, there was a settlement that was reached outside of court between the government and the children.

Appropriation is defined as "to set apart for or assign to a particular purpose or use in exclusion of all others."

In this case, the government set apart the value of the Kerman property for the particular purpose of securing the repayment of the El Nido emergency loan. This was done outside of the court's jurisdiction and without foreclosing on the security for the emergency funds.

C. DEBTOR'S ASSETS

In its opinion, the 9th circuit ruled that Petitioner had no propriety interest in the KERMAN property

An asset is defined as anything owned that has monetary value; any interest in real property or personal property that can be used for payment of debts." Here, the Court allowed Petitioner to use the Kerman property as a secondary collateral source for the El Nido emergency loan. During the appellate hearing, the government conceded the fact that Petitioner had a financial interest in the KERMAN property.

When the government extinguished the children's rights to the property, the government also extinguished Petitioner's interest. Petitioner had an interest in the Kerman property. The court's allowed him to use it as collateral to pay back a debt.

Due to the foregoing, the government is in fact initiating multiple actions in its attempt to foreclose on the El Nido property after its' action against the Kerman property. The government has violated the "security first" component by releasing its security interest against Petitioner and taking a "set-off" against Petitioner's account instead of foreclosing on the property. *Security Pac. Nat'l Bank v. Wozab*, (Cal. 1990) 51 Cal. 3d 991; *Walker v. Community Bank*, (Cal. 1974) 10 Cal. 3d. 729.

REASONS FOR GRANTING WRIT

This Court should grant petitioner's writ of certiorari due to the exceptional circumstances involved in the case that warrant further review. Moreover, the relief Petitioner seeks cannot be obtained in any other form or from any other court.

A. EQUITABLE ESTOPPEL SHOULD APPLY

The issue involved in this case is not new for the U.S. Supreme Court. Over the years, the question whether to allow a citizen to estop the government due to a governmental official's conduct has been reviewed many times by this Court. And in each case, the official's conduct did not rise to the level where the government should be equitably estopped. In the present case, however, the level of government misconduct far exceeds those previously reviewed. The time has arrived for the Court to revisit the issue of "affirmative misconduct" such that the doctrine of equitable estoppel should apply.

Although the Supreme Court has repeatedly reversed lower court decisions estopping the government, it has refused to rule out the possibility that the government might be estopped in some case. Yet the Court has refused to indicate what the appropriate case would be. Petitioner provides the appropriate circumstances where the government's action has triggered the application of equitable estoppel.

Moreover, cases where the government engaged in intentional or reckless misconduct require the Court to apply the doctrine to preserve public confidence in the government. Citizens are entitled to expect that their government will not engage in gross misconduct against them. The public is keenly interested in maintaining decency, honor and reliability in their government officials and

are waiting for the Court to hold the government accountable for the wrongful acts of its' officials.

B. CALIFORNIA'S ONE-ACTION RULE HAS BEEN VIOLATED

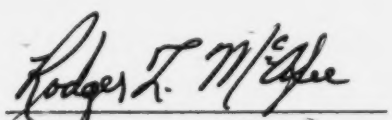
Under California law, a creditor must rely upon his security before enforcing the debt. Moreover, the law requires a secured creditor to proceed against the security before enforcing the underlying debt.

In the present case, the government did not follow the procedures set forth in Cal. Civ. Procedure Code §726 and must therefore be precluded from foreclosing on Petitioner's land. The lower courts failed to recognize the government's violation of California's "One-Action" and "Security First" rules. Petitioner therefore seeks relief from this Court to review the lower court's decision and prevent further injustice against Petitioner.

CONCLUSION

The judgment of the Ninth Circuit Court should be reversed.

Respectfully submitted:



Rodger L. McAfee
Petitioner, In Propria Persona